180 (1) No. 10- 10-979 JAN 25 2011

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IN THE

Supreme Court of the United States

FLORIDA DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES, AND FLORIDA COMMISSIONER OF AGRICULTURE CHARLES BRONSON,

Petitioners,

v.

TOBY BOGORFF, ROBERT BOGORFF, TIMOTHY FARLEY, BETH GARCIA, ROALD GARCIA, ROBERT PEARCE, AND BARBARA PEARCE, AS REPRESENTATIVES OF THE CERTIFIED CLASS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a legislature's choice to abate a public nuisance by eradicating plants exposed to a pest in order to preserve a healthy agricultural industry creates a compensable taking, in light of *Miller v. Schoene*, 276 U.S. 272 (1928).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	12
REASON FOR GRANTING THE PETITION	16
CONCLUSION	24

TABLE OF APPENDICES

Page

APPENDIX A – OPINION OF THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA, DATED MAY 12, 2010 ..... 1a

APPENDIX B – ORDER DENYING MOTION FOR REHEARING IN THE SUPREME COURT OF FLORIDA, DATED OCTOBER 28, 2010 ..... 17a

APPENDIX C – THE PLANT PROTECTION ACT, 7 U.S.C. §§ 7701, 7715, 7721, 7731..... 19a

TABLE OF CITED AUTHORITIES

Page

CASES

Dep't of Agric. & Cons. Servs. v. Bogorff,
35 So. 3d 84 (Fla. Dist. Ct. App. 2010) ..... 1, *passim*

Haire v. Fla. Dep't of Agric. & Cons. Servs.,
870 So. 2d 774 (Fla. 2004) 13

In re Malbrain,
86 P.3d 222 (Wash. Ct. App. 2004) 22

Keshbro, Inc. v. City of Miami,
801 So. 2d 864 (2001) 22

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987) ..... 19, *passim*

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 16, 22

Miller v. Schoene,
276 U.S. 272 (1928) ..... 16, *passim*

Miller v. State Entomologist,
146 Va. 175 (Va. 1926) 17

Sierra Club v. Morton,
405 U.S. 727 (1972) 19

Cited Authorities

Page

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S.Ct. 2592 (2010) 16, 21, 23

Treister v. City of Miami, 893 F. Supp. 1057 (S.D. Fla. 1992) 22

CONSTITUTIONAL PROVISIONS

U.S. Const., amend V 2

U.S. Const., amend XIV 2

Florida Const., art. X, § 6(a) 2, 3

STATUTES

7 U.S.C. § 7701 12

7 U.S.C. § 7701(1) 12

7 U.S.C. § 7715 12

7 U.S.C. §§ 7721 ..... 12, 22

7 U.S.C. §§ 7721(b) 12

7 U.S.C. §§ 7731 ..... 12, 22

28 U.S.C. § 1257 1

Page

Fla. Stat. § 570.07 ..... 3, 4, 5, 6, 12

Fla. Stat. § 581.031(15)(a)..... 6, 12

Fla. Stat. § 581.031(17)..... 7, 12

Fla. Stat. § 581.184 ..... 7, 15

Fla. Admin. Code § 5B-58.001 ..... 10, 15

2000 Laws of Florida, Ch. 308 ..... 8, 9, 13, 14

OTHER AUTHORITIES

Fla. Emer. Rule 5BER00-4, 26 Fla. Admin. L. Weekly 4502..... 11, 12, 15

Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321 (2005) 22

William A. Fischel, *The Law and Economics of Cedar-Apple Rust: State Action and Just Compensation in Miller v. Schoene*, 3 Rev. L. & Econ. 133, 144 (2007) 16

OPINIONS BELOW

The opinion of the Florida intermediate appellate court, the Fourth District Court of Appeal of Florida, is reported at *Dep't of Agriculture & Consumer Services. v. Bogorff*, 35 So. 3d 84 (Fla. Dist. Ct. App. 2010), and is Appendix A hereto.

The order of the Florida Supreme Court denying review in this case, Case No. SC10-1089, is unpublished, but available at 2010 WL 4304405 and 2010 Fla. LEXIS 1931, and is Appendix B hereto. It is dated October 28, 2010.

STATEMENT OF JURISDICTION

The opinion of the Florida Fourth District Court of Appeal was entered on May 12, 2010. The denial of petitioners' timely petition for review to the Florida Supreme Court was entered on October 28, 2010. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257.

This petition presents two bases for certiorari review under Supreme Court Rule 10. The Florida state court decisions conflict with *Miller v. State Entomologist*, 146 Va. 175 (Va. 1926). Sup. Ct. R. 10(b). This case also presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Fifth and Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Portions of the Plant Protection Act, 7 U.S.C. § 7701 *et seq.*, are lengthy, and are reproduced as Appendix C hereto.

Article X, § 6(a) of the Florida Constitution provides:

> Eminent domain.—
>
> (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by

> deposit in the registry of the court and available to the owner.

Florida Statutes § 570.07 (2010) provides in pertinent part:

> Department of Agriculture and Consumer Services; functions, powers, and duties.
>
> The department shall have and exercise the following functions, powers, and duties:
>
> (2) To perform all regulatory and inspection services relating to agriculture except agricultural education, demonstration, research, and those regulatory functions assigned by law to other state agencies. In doing this, the department may:
>
> > (a) Inspect for violations of and enforce all federal standards applicable to the responsibilities of the department, which were adopted for uniform application to protect the public health, safety, and welfare.
>
> (4) To cooperate with the United States Department of Agriculture and any other state or federal agency in any manner which may be helpful to agriculture in obtaining and disseminating production statistics and market and trade information concerning demand, supply, prevailing prices, and commercial movements of agricultural products and extent of products in storage.

(13) To protect the agricultural and horticultural interests of the state; and, to that end, it shall enforce those functions, powers, and duties given to it in chapter 581 and all other laws relating thereto.

(14) To inspect apiaries for diseases inimical to bees and beekeeping and enforce the laws relating thereto.

(15) To protect the livestock interests of the state; and, to that end, it shall enforce those functions, powers, and duties given to it in chapter 585 and all other laws relating thereto.

(16) To enforce the state laws and rules relating to:

(a) Fruit and vegetable inspection and grading;

(b)Pesticide spray, residue inspection, and removal;

(d) Classification, inspection, and sale of poultry and eggs;

(i) Foods, as set forth in the Florida Food Safety Act;

(j) Inspection and certification of honey;

(l) Licensing of dealers in agricultural products;

(m) Administration and enforcement of all regulatory legislation applying to milk and milk products, ice cream, and frozen desserts;

(o) All other regulatory laws relating to agriculture.

(17)

(h) To keep in touch with the Department of Agriculture in Washington, D.C., to advise our people what crops to plant or not plant, what markets are overstocked, and through a system of cooperation to aid in development of agricultural interests and protection of Florida's producers;

(i) To devise such methods as will best carry forward this work, such as inspection of packages and other measures that conform to the marketing system of the Department of Agriculture in Washington;

(19) To protect the dairy interests of the state; and, to that end, it shall enforce those functions, powers, and duties given to it in chapters 502 and 503.

> (21) To declare an emergency when one exists in any matter pertaining to agriculture; to make, adopt, and promulgate rules and issue orders which will be effective during the term of the emergency; and to issue or require to be issued food safety information, pertaining to the emergency, that is based on reliable scientific facts and reliable scientific data. When the Commissioner of Agriculture has declared an agricultural emergency, no county or municipal ordinance relating to any action intended to end the emergency shall be enforced within a county or municipality with respect to such action taken by the Department of Agriculture and Consumer Services during the agricultural emergency.

Florida Statutes § 581.031(15)(a) & (17) (2001) provides:

> Department; powers and duties.--The department has the following powers and duties:
>
> (15)(a) To inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place and to open any bundle, package, or other container containing, or thought to contain, such material, and to take possession of such material if determined by the department to pose a threat to the agricultural or public interests of this state.

> (17) To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles capable of harboring plant pests, noxious weeds, or arthropods, if they are infested or located in an area which may be suspected of being infested or infected due to its proximity to a known infestation, or if they were reasonably exposed to infestation, to prevent or control the dissemination of or to eradicate plant pests, noxious weeds, or arthropods, and to make rules governing these procedures.

Florida Statutes § 581.184 (2001) provided in pertinent part:

> Adoption of rules; citrus canker eradication; voluntary destruction agreements.—
>
> (1) As used in this section, the term:
>
> (a) "Infected or infested" means citrus trees harboring the citrus canker bacteria and exhibiting visible symptoms of the disease.
>
> (b) "Exposed to infection" means citrus trees located within 1,900 feet of an infected tree.
>
> (2)(a) The department shall remove and destroy all infected citrus trees and all citrus trees exposed to infection.

2000 Laws of Florida, Ch. 308, provided, in the Preamble and § 2, in pertinent part:

> WHEREAS, the citrus industry is very important to Florida's economy, generating $8 billion in revenue and providing nearly 100,000 jobs for Floridians, and
>
> WHEREAS, every citizen in the state benefits from property taxes, sales taxes, and other revenues generated by the citrus industry, and
>
> WHEREAS, Florida is known worldwide for its fresh and processed citrus, and
>
> WHEREAS, an emergency exists in the South Florida area regarding the spread of citrus canker, a bacterial disease that damages fruit, weakens and eventually kills trees, is highly contagious, and the presence of which causes quarantines to be imposed on the shipment of fresh fruit, and
>
> WHEREAS, joint state and federal attempts to eradicate citrus canker have so far been unsuccessful, and
>
> WHEREAS, despite destruction of citrus trees infected with citrus canker and of citrus trees within 125 feet of canker-infected trees, citrus canker has spread at an alarming rate and is now present throughout Miami-Dade County and Broward County, and

WHEREAS, if not eradicated quickly, citrus canker will spread to other parts of the state and may destroy the citrus industry and dooryard citrus throughout Florida, and

WHEREAS, recent scientific studies have shown that citrus trees as far as 1,900 feet from infected citrus trees will develop the disease from wind-blown rain or by other means, and

WHEREAS, the Third District Court of Appeals, in Sapp Farms, Inc., v. Florida Department of Agriculture and Consumer Services, DCA Case No. 3D00-487, held that citrus trees within a certain radius of infection (originally thought to be 125 feet but now scientifically determined to be at least 1,900 feet) necessarily harbor the citrus canker bacteria and thus are diseased and have no value, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 2. Section 581.184, Florida Statutes, is amended to read:

581.184 **Adoption** ~~Promulgation~~ of rules; citrus canker eradication; voluntary destruction agreements; buffer zone.-

(1) As used in this section, the term:

> **(a) Infected or infested means citrus trees harboring the citrus canker bacteria and exhibiting visible symptoms of the disease.**
>
> **(b) Exposed to infection means citrus trees harboring the citrus canker bacteria due to their proximity to infected citrus trees, and which do not yet exhibit visible symptoms of the disease but which will develop symptoms over time, at which point such trees will have infected other citrus trees.**

Florida Administrative Code § 5B-58.001 (2001), "Citrus Canker Eradication," provided in pertinent part:

> (1) Definitions. For the purpose of this rule, the definitions in Section 581.011, Florida Statutes, and the following definitions shall apply: . . .
>
> > (d) Citrus canker. A bacterial disease of citrus incited by the organism *Xanthomonas axonopodis pv. citri*, (formerly known as *Xanthomonas campestris pv. citri*), Asian strain. . . .
>
> (3) Declaration of citrus canker as a plant pest. Pursuant to Section 581.031(6), Florida Statutes, citrus canker, is declared to be a plant pest and a nuisance capable of causing serious damage to citrus. Any citrus, or any other regulated article capable of transporting or harboring citrus canker and therefore capable of spreading the disease is also declared to be a nuisance.

Florida Emergency Rule 5BER00-4, 26 Fla. Admin. L. Weekly 4502 (Sept. 29, 2000), provided in pertinent part:

> SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE: Citrus Canker, **Xanthomonas axonopodis pv. citri**, Asian strain is one of the most destructive bacterial diseases of citrus. It is found in Africa, Asia, Central America, and South America. Severe infections of citrus canker cause fruit to blemish which makes it difficult to market for fresh consumption, and the disease causes premature fruit drop, thereby reducing commercial citrus production. If not eradicated from the state, Florida's citrus industry valued at $8.5 million will be in jeopardy due to lost production and lost markets resulting from quarantine action. Recent tropical storms and hurricanes have resulted in disease spread from infected areas into non-infested areas ever closer to major citrus production areas. Expedited procedures for delivering Immediate Final Orders is necessary to enable the Department to remove infected and exposes trees in a more timely manner. In view of these specific facts and reasons and in accordance with the constitutional authority conferred upon the Commissioner of Agriculture by the Florida Constitution, Article IV, Section 4, and authorized by, Sections 570.07 (21) (to declare an emergency), 120.54 (a), 581.031 (6) (7), and 581.111, Florida Statutes, the Commissioner

> hereby finds that an immediate serious danger to the public health, safety or welfare exists, declares that an emergency to the agricultural and horticultural interests of this state exists and declares a quarantine on certain Florida citrus plants and plants parts, citrus fruit and other material as set forth in the emergency rule hereby promulgated.

STATEMENT OF THE CASE

Invasive plant pests are a serious and growing threat to this country's agriculture. In June 2000, Congress enacted the Plant Protection Act, 7 U.S.C. § 7701 *et seq.*, because the "detection, control, eradication, suppression, prevention, or retardation of the spread of plant pests or noxious weeds is necessary for the protection of the agriculture, environment, and economy of the United States." 7 U.S.C. § 7701(1). While the primary responsibility for controlling plant pests lies with state departments of agriculture, the United States Secretary of Agriculture through the United States Department of Agriculture (the "USDA") has the power in an extraordinary emergency to take necessary measures to combat plant pests. 7 U.S.C. § 7715.

The Florida Department of Agriculture and Consumer Services (the "FDACS") is responsible for protecting the integrity of the food supply of Florida, Fla. Stat. § 570.07, and in particular has the concurrent duty with the USDA to destroy agricultural pests and plants exposed to such pests, Fla. Stat. § 581.031(15) & (17) (2001); 7 U.S.C. §§ 7721(b), 7731.

Beginning in 1995, Florida faced an epidemic of Asian strain citrus canker, a virulent disease of citrus. Canker bacteria "attack the fruit, leaves and stems of citrus plants. Although the fruit of an infected tree remains edible, the disease causes defoliation, fruit drop and loss of yield, as well as blemishes on the fruit and a loss of quality." *Haire v. Fla. Dep't of Agric. & Cons. Servs.*, 870 So. 2d 774, 778 (Fla. 2004). In severe cases, canker can kill the tree. *Id.* Canker was an immediate serious threat to Florida's citrus industry and home-grown citrus. *Id.* Canker spreads primarily through wind-blown rain, and, due to Florida's subtropical climate, eradication of the disease required removal of all citrus within a 1900-foot radius around citrus visibly infected with canker. *Id.* at 778-79. Because "[s]tem lesions can survive for many years," canker-exposed trees without visible symptoms had to be removed. *Id.* at 778. The removal of the canker-exposed citrus preserved the health of unexposed citrus outside the removal radius.

The Florida legislature made the following factual findings in regard to the legislation governing the removal of canker-exposed citrus:

- "the citrus industry is very important to Florida's economy, generating $8 billion in revenue and providing nearly 100,000 jobs for Floridians,"

- "every citizen in the state benefits from property taxes, sales taxes, and other revenue generated by the citrus industry,"

- "an emergency exists in the South Florida area regarding the spread of citrus canker, a bacterial

disease that damages fruit, weakens and eventually kills trees, is highly contagious, and the presence of which causes quarantines to be imposed on the shipment of fresh fruit,"

- "joint state and federal attempts to eradicate citrus canker have so far been unsuccessful,"

- "despite destruction of citrus trees infected with citrus canker and of citrus trees within 125 feet of canker-infected trees, citrus canker has spread at an alarming rate and is now present throughout Miami-Dade County and Broward County,"

- "if not eradicated quickly, citrus canker will spread to other parts of the state and may destroy the citrus industry and dooryard citrus throughout Florida,"

- "recent scientific studies have shown that citrus trees as far as 1,900 feet from infected citrus trees will develop the disease from wind-blown rain or by other means," and

- "the Third District Court of Appeals, in *Sapp Farms, Inc. v. Florida Department of Agriculture and Consumer Services*, DCA Case No. 3D00-487, held that citrus trees within a certain radius of infection (originally thought to be 125 feet but now scientifically determined to be at least 1,900 feet) necessarily harbor the citrus canker bacteria and thus are diseased and have no value. . . ."

2000 Laws of Fla. Ch. 308 at 3. Citrus canker was further declared a "plant pest and nuisance capable of causing serious damage to citrus." Fla. Admin. Code §

5B-58.001(1)(d) & (3) (2001). Both Florida's Governor and Commissioner of Agriculture (the head of the FDACS) declared a citrus canker emergency. *See* Executive Order of Florida Governor No. 99-9; Fla. Emer. Rule 5BER00-4, 26 Fla. Admin. L. Weekly 4502 (Sept. 29, 2000).

To address the emergency, the FDACS and the USDA entered into an agreement to operate the Citrus Canker Eradication Program, the largest pest eradication program in the world. The Department removed citrus visibly infected by canker and citrus exposed to canker because it was located within 1900 feet of infected citrus. The program was accomplished under the state's police power and pursuant to statute, Fla. Stat. § 581.184(1) & (2) (2001). The constitutionality of the program and in particular the science underlying the necessity of destroying canker-exposed citrus was upheld by the Florida Supreme Court against substantive and procedural due process challenges. *Haire,* 870 So. 2d at 780-88.

Homeowners whose citrus was destroyed because it was in the exposure zone for canker sued as a class under the takings clause of the Florida Constitution, while reserving their right to sue under the takings clause in the Fifth and Fourteenth Amendments to the United States Constitution. The homeowners stipulated that their trees were not used for commercial purposes, and the removal of citrus from their properties typically did not diminish the properties' market value. The state trial court found the canker-exposed citrus was constitutionally compensable, the FDACS's removal of the citrus was a taking, and the FDACS was liable in inverse condemnation therefor. The class was awarded the "replacement cost" of the canker-exposed citrus trees that were removed.

On appeal, the Florida Fourth District Court of Appeal, the Florida intermediate appellate court, affirmed the decision, holding: "If trees are destroyed not to prevent harm but instead to benefit an industry, it is difficult to understand how [the FDACS] can argue on appeal that the trees legally constituted a nuisance without any value. **Property with any value cannot be deemed a nuisance, the nature of which perforce lacks that redeeming quality.**" *Dep't of Agric. & Cons. Servs. v. Bogorff*, 35 So. 3d 84, 89 (Fla. Dist. Ct. App. 2010) (emphasis added) (Pet. App. 7a). The FDACS, joined by the National Association of State Departments of Agriculture, asked the Florida Supreme Court to review the decision. It declined. Pet. App. B. This petition followed.

REASON FOR GRANTING THE PETITION

The holding in *Bogorff* is inconsistent with *Miller v. Schoene*, 276 U.S. 272 (1928), in which this Court explained what the Florida court found "difficult to understand": that a state can lawfully and without compensation make "a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity." *Id.* at 279. *Miller is* a "leading takings case," William A. Fischel, *The Law and Economics of Cedar-Apple Rust: State Action and Just Compensation in Miller v. Schoene*, 3 Rev. L. & Econ. 133, 144 (2007), and applied the principle that the abatement of a public nuisance in the form of the eradication of a plant pest is not a compensable taking, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S.Ct. 2592, 2609 (2010).

In *Miller*, an act of the Virginia legislature provided that any red cedar tree within two miles of an apple orchard could be destroyed by the state because the cedar "is or may be the source" of the virulent disease of cedar rust, and thus constituted a "public nuisance." *Id.* at 277-79. The apple industry was "one of the principal agricultural pursuits in Virginia," while cedar had less value as timber and minimal value as ornament. *Id.* at 279. The act did not allow "compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise. . . ." *Id.* at 277.

Although cedar itself "seemed not to be appreciably affected by" cedar rust, Virginia considered cedar within the exposure zone to be a public nuisance due to its proximity to valuable agriculture (the apple orchards), and the ability of the pest to spread from the cedar, which suffered no harm, to the apple trees, which did. *Id.* at 278. Declaring plants infected with and exposed to pests to be public nuisances is, in the context of agricultural law and policy, simply a way of weighing the greater utility of the threatened crops against the lesser utility of the pestilent plants.

The trial court and the Virginia Supreme Court denied compensation to the owner of the destroyed cedar. *Miller v. State Entomologist*, 146 Va. 175 (Va. 1926). In a unanimous decision, this Court affirmed, holding, "When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, **in the judgment of the legislature**, is of greater value to the public. It will not do to say that the case is merely one of

a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property for it is obvious that there may be, and there is, a preponderant public concern in the preservation of the one interest over the other." *Id.* at 279 (emphasis added).

Miller governs the instant case. The first class of property here is the canker-exposed citrus, analogous to red cedar, which had value to its owner, but was "in dangerous proximity" to healthy citrus, due to its falling within the 1900-foot exposure radius. The second class is the healthy commercial and homegrown citrus, which the Florida legislature sought to protect.

The "necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity," *id.* at 279, faced by the Virginia legislature was identical to the choice faced by the Florida legislature: whether to destroy canker-exposed citrus, or allow the disease to take its toll on healthy commercial and residential citrus proximate to the canker-exposed trees. *Miller* required the court below to recognize and evaluate the utility of the two classes of property, with appropriate deference to the "judgment of the legislature."

The *Bogorff* court did no such thing. It created a holding at odds with *Miller*, that "[t]o be a public nuisance, property must cause inconvenience or damage to the public generally," and that eradication of a pest which "benefit[s] an industry," must necessarily be a taking. *Bogorff*, 35 So. 3d at 89 (Pet. App. 7a). The canker-exposed trees could not be a public nuisance, according to *Bogorff*,

because they "continued to produce the fruit, the juice, the shade, the pleasing aromas, the agreeable vistas—all the virtues for which their owners carefully planted and tended them." *Id.* at 88 (Pet. App. 5a). *Cf. Sierra Club v. Morton*, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting) (opining that groves of trees should have standing to sue).

Bogorff did not weigh the value of healthy citrus in Florida; it actually mandated that the commercial citrus industry could not have any value in a takings setting, and that residential citrus, despite its exposure to disease, commanded inherent value, contrary to rough weighing of interests in property required by *Miller*.

This Court applied *Miller* in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), where it upheld a Pennsylvania statute restricting the right of coal companies to remove subterranean coal from their land in order to protect the surface against subsidence.

The Court began its analysis by noting that "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property." *Id.* at 489. The Court relied heavily on *Miller*, commenting that in "upholding the state action, the Court did not consider it necessary to 'weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute.' Rather, it was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation." *Id.* at 490 (quoting *Miller*, 276 U.S. at 280). In other words,

"the State has not 'taken' anything when it asserts its power to enjoin nuisance-like activity." *Id.* at 491 n.20.

The Court emphasized the identification of the particular property right taken from the "full bundle of property rights" as a fundamental component of a comprehensive takings analysis. *Id.* at 497. The right to mine a limited amount of coal was a single strand of the bundle in *Keystone,* not amounting to the infringement of "reasonable investment-backed expectations." *Id.* at 499. Similarly, in this case, the canker-exposed trees were only one fixture on the homeowners' real property, which lacked any commercial value, and the removal of which was so insignificant that it typically did not affect the market value of the property.

This Court in *Keystone* also examined the "reciprocity of advantage"—that "the State's primary ways of preserving the public weal is restricting the uses individuals can make of their own property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Id.* at 491. Owners of citrus removed under the Citrus Canker Eradication Program benefited thereby—from the reciprocal advantage of husbanding other crops threatened by invasive pests but protected by the FDACS and USDA's pest control activities, and by the prospects of later replanting citrus if canker was eradicated.

The *Bogorff* court erred by not following *Keystone.* Citrus canker, whether considered a nuisance or "nuisance-like," was a serious threat to the Florida citrus industry and homegrown citrus. Because of "a preponderant public concern in the preservation of the one interest," *Miller,*

276 U.S. at 279, "the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation," *Keystone*, 480 U.S. at 490.

Although "generally speaking, state law defines property interests," *Stop the Beach Renourishment*, 130 S.Ct. at 2597, here both classes of property—the canker-exposed citrus and the healthy citrus—were recognized as property interests under state law. *Miller* and *Keystone* require courts to defer to (or at least recognize) legitimate legislative purposes and weigh the interests of the owners of the property sought to be protected by the legislature against the interests of the owners of the nuisance. Instead, the *Bogorff* court ignored the interests of healthy citrus owners and Florida's citrus industry by defining the term "public nuisance" in so restrictive a manner it could not apply.

Bogorff departed from settled takings law when it held: "If trees are destroyed not to prevent harm but instead to benefit an industry, it is difficult to understand how FDACS can argue on appeal that the trees legally constituted a nuisance without any value." 35 So. 3d at 89 (Pet. App. 7a). As *Miller* demonstrates, the State can act to protect a particular industry, can do so under its police powers, can destroy property with value, and still not cause a compensable taking. The conclusion that compensation is required entails analysis of the importance of the strand of property rights out of the complete bundle, and the State's interest in effectuating the taking—analyses that the *Bogorff* court did not perform. *Bogorff's* holding that "[p]roperty with any value cannot be deemed a nuisance, the nature of which perforce lacks that redeeming quality," is flatly wrong; no such rule exists in condemnation law. If

taken seriously, this holding eliminates the public nuisance exception to takings claims, since virtually every nuisance that constitutes a harm to one segment of the public has some value to its owners, as did the red cedar in Virginia, the coal mined in Pennsylvania, and the canker-exposed citrus in backyards in Florida.

Reversing *Bogorff* is important to the nation's agriculture. When a state is unable to act effectively to combat a plant pest, agriculture suffers, the food supply is threatened, and the federal government may have to step in. 7 U.S.C. §§ 7721, 7731. In this regard, Florida is ground zero for invasive plant and animal pests.

Reversing *Bogorff* is also important to takings law. Despite small differences in the language in the federal and state takings clauses, case law tends to be uniform across federal and state jurisdictions. *Treister v. City of Miami*, 893 F. Supp. 1057, 1068 (S.D. Fla. 1992). Relying on this Court's holding in *Lucas*, Florida takings law follows the principle that the abatement of an agricultural nuisance is not a taking, *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 869-77 (2001), as does the law of other states that have addressed the issue, Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321 (2005). Indeed, *Bogorff* purported to rely on *Lucas*. Pet. App. 10a. Florida agricultural takings law in turn influences federal law, and the law of other states. *See, e.g., In re Malbrain*, 86 P.3d 222 (Wash. Ct. App. 2004) (state department of agriculture need not compensate owners of trees destroyed to control the citrus long-horned beetle, a pest of citrus and many other species of trees, based on part on Florida citrus

canker law). Indeed, the class in this case has reserved the right to bring a federal lawsuit under the Fifth and Fourteenth Amendments for the destruction of their canker-exposed citrus.

In a sense, this case is the inverse of *Stop the Beach Renourishment*. Where that case considered whether the Florida Supreme Court had engaged in a judicial taking of property by overturning a century of law on littoral rights, 130 S.Ct. at 2610-11, the instant case concerns whether Florida state courts have restricted the state's legitimate right to abate a public nuisance without compensation by overturning longstanding federal takings law. This Court should correct this overswing of the pendulum.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 25, 2011

APPENDIX

APPENDIX A — OPINION OF THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA, DATED MAY 12, 2010

DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT.

DEPARTMENT OF AGRICULTURE &
CONSUMER SERVICES

No. 4D08-4474.
May 12, 2010.

35 So.3d 84, 35 Fla. L. Weekly D1062
(Cite as: 35 So.3d 84)

State of Florida,

Appellant,

v.

Toby BOGORFF, Robert Bogorff, Timothy Farley, Beth Garcia, Roald Garcia, Robert Pearce, and Barbara Pearce, as representatives of the certified class,

Appellees.

FARMER, J.

The Florida Department of Agriculture and Consumer Services (DACS) appeals a final judgment in

favor of a class of more than 50,000 owners of healthy citrus trees in Broward County cut down and destroyed by DACS as part of its citrus canker eradication program (CCEP).[1] The trial judge found that over 100,000 non-commercial trees in the County not affected with citrus canker had been taken and destroyed by DACS during the covered period, that the taking was for a public purpose, and that the owners of these residential trees were entitled to just and fair compensation for their healthy trees. A jury then found that just compensation for the class was $11,531,463. After applying certain setoffs and adding pre-judgment interest, the court entered judgment against DACS and the State of Florida in the amount of $8,043,542.

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1. For a history of prior review in this case, *see*:

(1) *Fla. Dep't of Agric. & Consumer Servs. v. City of Pompano Beach*, 792 So.2d 539 (Fla. 4th DCA 2001);

(2) *Fla Dep't of Agric. & Consumer Servs. v. City of Pompano Beach*, 829 So.2d 928 (Fla. 4th DCA 2002), *rev denied*, 845 So.2d 889 (Fla.2003);

(3) *Fla. Dep't of Agric & Consumer Servs. v. Haire*, 836 So.2d 1040 (Fla. 4th DCA 2003), *rev. granted*, 842 So.2d 844 (Fla.2003);

(4) *Haire v Fla Dept. of Agric. & Consumer Servs.*, 870 So.2d 774 (Fla.2004); and

(5) *Fla. Dept of Agric & Consumer Servs. v. Cox*, 947 So.2d 561 (Fla. 4th DCA 2006), *rev. denied*, 962 So.2d 336 (Fla.2007).

On appeal, DACS essentially argues:

A. The trial court improperly rejected its evidence in favor of the evidence offered by the plaintiff class.

B. No inverse condemnation was shown because the trees lacked any compensable value, citrus canker being deemed a public nuisance as a matter of law, and the trial court applied the wrong test for determining whether there had been a taking.

C. The legislature has abolished any common law claim of inverse condemnation and replaced it with a statutory claim.

D. The court applied the wrong measure of damages for the healthy trees destroyed in the CCEP.

E. No pre-judgment interest is allowed in this case.

There is no merit in any of these arguments.

A. Whose evidence and science was more reliable and credible?

When the contention is that the trier of fact has rejected what a party believes is the better evidence, both lay and expert, the supreme court has explained:

> "It is clear that the function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the

> bearing, demeanor and credibility of the witnesses appearing in the cause. *It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it.* The test ... is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject 'inherently incredible and improbable testimony or evidence,' ... it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court." [e.s.]

Shaw v. Shaw, 334 So.2d 13, 16 (Fla.1976). Moreover, when specific findings of fact on discrete conflicts in the evidence are not made by the trial judge or by a jury in a special interrogatory verdict, we are required to accept those facts shown by the evidence as favoring the prevailing party.[2] On all the factual claims made by DACS in this appeal, the settled facts are not as it represents. Instead the evidence establishes quite the contrary.

There is substantial competent evidence that healthy, privately owned citrus trees are not harmful or destructive, even though found within 1,900 feet of a tree having citrus canker. There is evidence in the

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2. *New Nautical Coatings Inc. v. Scoggin*, 731 So.2d 145 (Fla. 4th DCA 1999); *S. Bell Tel. & Tel Co. v. Broward County*, 665 So.2d 272, 274 (Fla. 4th DCA 1995); *NCNB Nat'l Bank of Fla. v. Aetna Cas & Sur. Co.*, 477 So.2d 579, 583 (Fla. 4th DCA 1985).

record that the healthy trees taken under the CCEP had continued to produce the fruit, the juice, the shade, the pleasing aromas, the agreeable vistas-all the virtues for which their owners carefully planted and tended them. There was expert testimony that no study using an acceptable scientific method supports a conclusion that healthy trees so situated will necessarily develop citrus canker or bring trouble or damage to anybody. DACS has failed to show error here.

Moreover the finder of fact is free to determine the reliability and credibility of expert opinions and, if conflicting, to weigh them as the finder sees fit.[3] Even when expert testimony is unchallenged, the finder of fact is free to weigh the opinion, just as it does with any other witness, and reject such testimony.[4] We routinely

3. *Easkold v. Rhodes,* 614 So.2d 495, 498 (Fla.1993); *Vorsteg v Thomas,* 853 So.2d 1102, 1103 (Fla. 4th DCA 2003).

4. *Behm v Div of Admin , State Dept. of Transp.,* 336 So.2d 579 (Fla.1976) (jury's function is to weigh credibility and reliability of expert testimony; expert opinion is worth no more than reasons on which it is based; if properly susceptible to differing interpretations jury is free to make such interpretations); *Rosenbloom v. Rosenbloom,* 892 So.2d 531, 535 (Fla. 4th DCA 2005) (trier of fact not bound by testimony of expert witnesses even where unrebutted); *Southpointe Homeowners Ass'n Inc. v. Segarra,* 763 So.2d 1186, 1187 (Fla. 4th DCA 2000) (trial judges are not bound by unrebutted expert testimony); *Baldwin Piano & Organ Co. v. Dote,* 740 So.2d 1230 (Fla. 4th DCA 1999); *County of Sarasota v. Burdette,* 479 So 2d 763, 764 (Fla. 2d DCA 1985) (jury could return verdict for amount less than maximum sought by landowner because jury determines weight and credibility to be given expert's testimony).

instruct juries that it is their function to resolve conflicts and to reject an expert's testimony and rely on other record evidence.[5] Although an expert's opinion may seem forcefully and unequivocally influential, in weighing all the evidence the jury may still apply its knowledge and experience and rely on other evidence.[6]

By its argument, DACS is attempting to have a reviewing court decide which side's evidence-scientific and otherwise-should be accepted as a matter of law, and which to reject. We are not able to engage in that kind of review. As the foregoing authorities establish, it is solely the province of the finder of fact to determine which science is real, which evidence is most reliable. None of the evidence supporting the judgment is inherently incredible or improbable. Both the judge (as to the takings) and the jury (as to just compensation) simply thought the evidence and science of the class of plaintiffs was the more reliable and credible. We must accept those decisions, for they are based on substantial competent evidence.

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5. *See* Fla. Std. Jury Instr. (Civ.) 2.2*b* ("You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case"); *Shaw v Puleo*, 159 So.2d 641, 644 (Fla.1964), *modified on other grounds, Griffis v. Hill*, 230 So.2d 143 (Fla.1969); *Gulf Life Ins. Co. v. Shelton*, 155 Fla. 586, 21 So.2d 39 (1945).

6. *Trolinger v State*, 300 So.2d 310 (Fla. 2d DCA 1974), *cert. denied*, 310 So.2d 740 (Fla.1975).

B. Inverse condemnation; value of trees; public nuisance; test for taking.

DACS argues it is not liable for any damages as a matter of law because healthy trees exposed to citrus canker constitute a public nuisance having no value, that exposed citrus will itself develop canker and become worthless. It is apparent from the history of this case that DACS destroyed these privately owned healthy trees not because they were really "imminently dangerous" to anybody but instead to benefit the citrus industry in Florida. *See Dep't of Agric. & Consumer Servs. v. Haire*, 836 So.2d 1040, 1050 (Fla. 4th DCA 2003) ("because protecting the citrus industry benefits the public welfare, it is within the state's police power to summarily destroy trees to combat citrus canker"). To be a public nuisance, property must cause "inconvenience or damage to the public generally."[7] If trees are destroyed not to prevent harm but instead to benefit an industry, it is difficult to understand how DACS can argue on appeal that the trees legally constituted a nuisance without any value. Property with any value cannot be deemed a nuisance, the nature of which perforce lacks that redeeming quality.

Here again DACS asks us to prefer evidence it presented to the takings judge, and then to the jury, and disregard the contrary evidence on which both relied in making their decisions. "Whether regulatory action of a public body amounts to a taking must be determined

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7. *Orlando Sports Stadium Inc. v. State ex rel. Powell*, 262 So.2d 881, 884 (Fla.1972).

from the facts of each case ... and the trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation." *Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers Inc.*, 521 So.2d 101, 104 (Fla.1988) ("*Mid-Florida Growers I*"). A trial court's finding of liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by competent, substantial evidence. *Atl. Int'l Inv. Corp. v. State*, 478 So.2d 805, 808 (Fla.1985).

It has long been acknowledged that a "physical invasion" of private property is the clearest example of a governmental taking for which just compensation is due. *See e.g. United States v. Gen. Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945) (destruction of property constitutes a taking); *United States v. Welch*, 217 U.S. 333, 339, 30 S.Ct. 527, 54 L.Ed. 787 (1910) (agency destroyed easement by flooding: "if it were ... destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end"); *Corneal v. State Plant Bd.*, 95 So.2d 1, 6 (Fla.1957) ("We have found no case-and none has been cited-holding that a healthy plant or animal, not *imminently* dangerous, may be destroyed without compensation to the owner in order to protect a neighbor's plant or animal of the same specie" [e.o.]); *Kendry v. State Rd. Dept.*, 213 So.2d 23 (Fla. 4th DCA 1968) (flooding resulted in taking).[8]

8. *See also Penn. Coal Co v Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (regulatory action that goes too far is taking).

Appendix A

DACS argues that the trial judge used the wrong legal test for regulatory takings. Frankly it is difficult to understand how the test used would be error. It is true that whether a regulation amounts to a taking may depend on the unique circumstances of the case, and the court's factual inquiry may change from case to case. *See Rubano v. Fla. Dep't of Transp.*, 656 So.2d 1264, 1266 (Fla.1995). But in *Graham v. Estuary Properties Inc.*, 399 So.2d 1374 (Fla.1981), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981), the court recognized no settled formula to determine where a valid exercise of the police power ends and a taking of property begins. The court did discuss some nonexclusive factors, the first of which (physical invasion or destruction) is dispositive under the facts of this case.

The facts of this case require no application of multi-part, recondite *tests* to decide whether the State regulation has gone too far and must pay just compensation. Cutting down and destroying healthy non-commercial trees of private citizens could hardly be more definitively a taking.[9] Government has regulatory power for the very purpose of *safeguarding* the rights of citizens, not for destroying them. Under any possible meaning, if government cuts down and burns private property having value, then government has taken it. And if government has taken it, government must pay for it.

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9. *Corneal*, 95 So.2d at 1, 6-7 (holding that Plant Board had clear legal duty to pay just compensation to owners of healthy citrus trees destroyed under a compulsory program).

To the argument that the Legislature has labeled citrus canker a public nuisance, it is also settled that "a State, by *ipse dixit*, may not transform private property into public property without compensation." [e.o.] *Webb's Fabulous Pharm. Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) ("South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law [for public nuisance]").

C. Common law and statutory claims of inverse condemnation.

DACS argues that the Legislature eliminated the common law claim for inverse condemnation of citrus trees and replaced it with an exclusive statutory claim.[10] Like most of the arguments of DACS in this dispute, it seems to have been made without regard to history, positive law or precedent. More than a half century ago in *State Plant Board v. Smith*, 110 So.2d 401 (Fla.1959), a case involving a predecessor agency of DACS also destroying healthy citrus plants to eradicate a plant disease, the court made very clear that "where, as here, a [constitutional] provision for 'just compensation' is a clear requisite to the act of destruction, then we find no authority for the Legislature's specification of the maximum compensation to be paid." 110 So.2d at 407.

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10. *See* § 581.1845, Fla. Stat. (2004).

That decision eliminated any basis to argue the contrary as DACS seeks to do here.

Then again, little more than 20 years ago, in *Mid-Florida Growers I*, another case also involving a state agency's destruction of healthy citrus plants to eradicate a plant disease, the supreme court reaffirmed *State Plant Board* in holding that constitutional just compensation "was a clear requisite ... to the act of destroying healthy trees." 521 So.2d at 104. Even more emphatically, the court added: "Because article X, § 6, Fla. Const. is self-executing, it is immaterial that there is no statute specifically authorizing recovery for loss." 521 So.2d at 104 n. 2 [c.o.].

If it is not yet clear, the point is that the common law and statutory provisions for inverse condemnation do not displace the constitutional requirement for just compensation when the State destroys privately owned property to aid some industry. The only effect of § 581.1845 is to set an opening bid for the price the State will pay without litigation. As the court said in *Patchen v. Fla. Dep't of Agric. & Consumer Servs.*, 906 So.2d 1005, 1008 (Fla.2005):

> "Citrus Canker Law sets a compensation floor that is consistent with the established principle that 'the determination of what is just compensation ... is a judicial function that cannot be performed by the Legislature'" [quoting *Haire*, 870 So.2d at 785 (quoting *State Plant Board*, 110 So.2d at 407 (quoting

Spafford v. Brevard County, 92 Fla. 617, 110 So. 451, 454 (1926)))].

If the compensation required by the Constitution exceeds a statutory amount, the State will have to pay that amount.

D. The measure of damages.

DACS argues that the trial court instructed the jury as to the wrong measure of damages. In takings cases, "the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case."[11] In this dispute we previously rejected this identical argument when DACS appealed class certification. *Fla. Dept. of Agri. & Consumer Servs. v. City of Pompano Beach*, 829 So.2d 928 (Fla. 4th DCA 2002), *rev. denied*, 845 So.2d 889 (Fla.2003) (appeal of class certification, rejecting argument that as matter of law class claims are not compensable and finding no error in using replacement value for destruction of healthy trees). The trial court credited the testimony of the two expert witnesses for the class that replacement cost is the only measure used by arborists familiar with the trade. In fact the trial court took note of the fact that DACS itself directed a staff employee to research the replacement cost of the

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11. *Fla. Dep't of Agric & Consumer Servs. v. Mid-Florida Growers Inc*, 570 So.2d 892, 895 (Fla.1990) (*Mid-Florida Growers II*) (quoting *Dade County v Gen Waterworks Corp*, 267 So.2d 633, 639 (Fla.1972)).

trees before the subject version of the CCEP was adopted and implemented.

We also find no error in the trial judge's decision not to rely on DACS witnesses who used the reduction in value of real estate as the measurement. It seems apparent to us that the issue here was not the value of the existing real estate but the value of the trees destroyed.

E. Pre-judgment interest.

The jury assessed class compensation of $11,531,463, determining that DACS was entitled to set-offs equal to the amounts actually used by the class on their retail gift cards and the $55 statutory tree payments. After deducting these set-offs (which were stipulated as $7,196,370), the amount of the judgment was $4,335,093, before pre-judgment interest.

The plaintiff class sought pre-judgment interest from the date their property was destroyed by DACS, consistent with the eminent domain statute and established precedent in takings cases.[12] We agree that the trial judge did not err by calculating pre-judgment interest from the filing date of the case, while giving

12. *See* § 74.061, Fla. Stat. (2008); *Behm v. Div. of Admin., State Dept. of Transp.*, 383 So.2d 216, 218 (Fla.1980); *State Rd Dep't v Bender*, 147 Fla. 15, 2 So.2d 298 (1941) (interest awarded from date of taking); *County of Volusia v. Pickens*, 439 So.2d 276, 277 (Fla. 5th DCA 1983) (prejudgment interest based on value of property from date of taking).

DACS credit for set-offs in the year in which they were actually provided. This procedure was consistent with the statute and prior decisions upholding pre-judgment interest in takings cases.

In this regard, we note that-over the objections of the certified class-DACS sought and was granted an aggregate verdict, even though the takings involved thousands of trees over a period of time. Consistent with this aggregation, no error is shown in the trial court's calculation of interest from the date this action was filed. It does not strike us as unfair to DACS to fix the date of loss for purposes of pre-judgment interest as the filing date of the class action for so many trees taken from so many owners on so many different dates.[13] The date of filing was necessarily well after the actual dates of destruction for many trees and thus benefits DACS.

Finally on a procedural issue, any error in the denial of a stay pending non-final review of the trial court's order requiring DACS to fund the cost of notice to the class could be seen as rendered moot by the takings judgment and the verdict on just compensation. As the party taking the property, the State is obviously liable for these costs. But we agree with the class that stays pending review are within the supreme court's exclusive authority over procedural rules in judicial review. *See*

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13. *See Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212 (Fla.1985) (for purpose of assessing pre-judgment interest, claim becomes liquidated when verdict has effect of fixing damages as of prior date).

Fla. R.App. P. 9.310; *St. Mary's Hosp. v. Phillipe*, 769 So.2d 961 (Fla.2000) (statute limiting right of malpractice defendant to stay arbitration award did not unconstitutionally infringe rule expressly requiring automatic stay of money judgment by posting bond because defendants voluntarily participated in statutory arbitration process and thus also agreed to different stay procedure in statute).

We find no error shown in any other arguments made by DACS.

Affirmed.

TAYLOR, J., concurs.

LEVINE, J., concurs specially with opinion.

LEVINE, J., concurring specially.

I fully agree with the majority opinion, but I write to emphasize the clear legal right of the individual homeowner to receive just compensation as a result of the actions of the State. The State's actions in cutting down these trees most assuredly constituted "takings," whether under the regulatory takings or physical takings analysis, that demanded just compensation. Regardless of the type of takings denominated here, the result in this case must be the same-full and just compensation to the homeowners.

By requiring the State to abide by its constitutional obligation to compensate individual homeowners, we safeguard the property rights of all. "The sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary." Joseph Story, *The Value and Importance of Legal Studies* (1829), *in Miscellaneous Writings of Joseph Story* 503, 519 (William W. Story ed., 1852).

As highlighted by the majority opinion, it is well settled in law that generally there is a right to just compensation where private property is taken for the public welfare. As Justice Black stated, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). In this case, by requiring the State to provide just and fair compensation, it alleviates from the affected homeowners the onerous burden of shouldering costs that should be borne by all the citizenry.

APPENDIX B — ORDER DENYING MOTION FOR REHEARING IN THE SUPREME COURT OF FLORIDA, DATED OCTOBER 28, 2010

SUPREME COURT OF FLORIDA
THURSDAY, OCTOBER 28, 2010

CASE NO.: SC10-1089
Lower Tribunal No(s).: 4D08-4474

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Petitioner(s)

vs.

TOBY BOGORFF, ET AL.

Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

Appendix B

PARIENTE, LEWIS, QUINCE, POLSTON, and LABARGA, JJ., concur.

A True Copy
Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

APPENDIX C — THE PLANT PROTECTION ACT, 7 U.S.C. §§ 7701, 7715, 7721, 7731

7 U.S.C. § 7701. Findings

Congress finds that–

(1) the detection, control, eradication, suppression, prevention, or retardation of the spread of plant pests or noxious weeds is necessary for the protection of the agriculture, environment, and economy of the United States;

(2) biological control is often a desirable, low-risk means of ridding crops and other plants of plant pests and noxious weeds, and its use should be facilitated by the Department of Agriculture, other Federal agencies, and States whenever feasible;

(3) it is the responsibility of the Secretary to facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds;

(4) decisions affecting imports, exports, and interstate movement of products regulated under this chapter shall be based on sound science;

(5) the smooth movement of enterable plants, plant products, biological control organisms, or other articles into, out of, or within the United States is vital to the United State's [1] economy and should be facilitated to the extent possible;

(6) export markets could be severely impacted by the introduction or spread of plant pests or noxious weeds into or within the United States;

(7) the unregulated movement of plant pests, noxious weeds, plants, certain biological control organisms, plant products, and articles capable of harboring plant pests or noxious weeds could present an unacceptable risk of introducing or spreading plant pests or noxious weeds;

(8) the existence on any premises in the United States of a plant pest or noxious weed new to or not known to be widely prevalent in or distributed within and throughout the United States could constitute a threat to crops and other plants or plant products of the United States and burden interstate commerce or foreign commerce; and

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[1] So in original.

(9) all plant pests, noxious weeds, plants, plant products, articles capable of harboring plant pests or noxious weeds regulated under this chapter are in or affect interstate commerce or foreign commerce.

7 U.S.C. § 7715. Declaration of extraordinary emergency and resulting authorities

(a) Authority to declare

If the Secretary determines that an extraordinary emergency exists because of the presence of a plant pest or noxious weed that is new to or not known to be widely prevalent in or distributed within and throughout the United States and that the presence of the plant pest or noxious weed threatens plants or plant products of the United States, the Secretary may–

(1) hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of, any plant, biological control organism, plant product, article, or means of conveyance that the Secretary has reason to believe is infested with the plant pest or noxious weed;

(2) quarantine, treat, or apply other remedial measures to any premises,

including any plants, biological control organisms, plant products, articles, or means of conveyance on the premises, that the Secretary has reason to believe is infested with the plant pest or noxious weed;

(3) quarantine any State or portion of a State in which the Secretary finds the plant pest or noxious weed or any plant, biological control organism, plant product, article, or means of conveyance that the Secretary has reason to believe is infested with the plant pest or noxious weed; and

(4) prohibit or restrict the movement within a State of any plant, biological control organism, plant product, article, or means of conveyance when the Secretary determines that the prohibition or restriction is necessary to prevent the dissemination of the plant pest or noxious weed or to eradicate the plant pest or noxious weed.

(b) Required finding of emergency

The Secretary may take action under this section only upon finding, after review and

consultation with the Governor or other appropriate official of the State affected, that the measures being taken by the State are inadequate to eradicate the plant pest or noxious weed.

(c) Notification procedures

(1) In general

Except as provided in paragraph (2), before any action is taken in any State under this section, the Secretary shall notify the Governor or other appropriate official of the State affected, issue a public announcement, and file for publication in the Federal Register a statement of–

(A) the Secretary's findings;

(B) the action the Secretary intends to take;

(C) the reasons for the intended action; and

(D) where practicable, an estimate of the anticipated duration of the extraordinary emergency.

(2) Time sensitive actions

If it is not possible to file for publication in the Federal Register prior to taking action, the filing shall be made within a reasonable time, not to exceed 10 business days, after commencement of the action.

(d) Application of least drastic action

No plant, biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance shall be destroyed, exported, or returned to the shipping point of origin, or ordered to be destroyed, exported, or returned to the shipping point of origin under this section unless, in the opinion of the Secretary, there is no less drastic action that is feasible and that would be adequate to prevent the dissemination of any plant pest or noxious weed new to or not known to be widely prevalent or distributed within and throughout the United States.

(e) Payment of compensation

The Secretary may pay compensation to any person for economic losses incurred by the person as a result of action taken by the Secretary under this section. The determination by the Secretary of the amount

of any compensation to be paid under this subsection shall be final and shall not be subject to judicial review or a review by any officer or employee of the Federal Government other than the Secretary or the designee of the Secretary.

7 U.S.C. § 7721. Plant pest and disease management and disaster prevention

(a) Definitions

In this section:

(1) Early plant pest detection and surveillance

The term "early plant pest detection and surveillance" means the full range of activities undertaken to find newly introduced plant pests, whether the plant pests are new to the United States or new to certain areas of the United States, before–

(A) the plant pests become established; or

(B) the plant pest infestations become too large and costly to eradicate or control.

Appendix C

(2) Specialty crop

The term "specialty crop" has the meaning given the term in section 3 of the Specialty Crops Competitiveness Act of 2004 (7 U.S.C. 1621 note; Public Law 108-465).

(3) State department of agriculture

The term "State department of agriculture" means an agency of a State that has a legal responsibility to perform early plant pest detection and surveillance activities.

(b) Early plant pest detection and surveillance improvement program

(1) Cooperative agreements

The Secretary shall enter into a cooperative agreement with each State department of agriculture that agrees to conduct early plant pest detection and surveillance activities.

(2) Consultation

In carrying out this subsection, the Secretary shall consult with–

(A) the National Plant Board; and

(B) other interested parties.

(3) Federal Advisory Committee Act

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to consultations under this subsection.

(4) Application

(A) In general

A State department of agriculture seeking to enter into a cooperative agreement under this subsection shall submit to the Secretary an application containing such information as the Secretary may require.

(B) Notification

The Secretary shall notify applicants of–

(i) the requirements to be imposed on a State department of agriculture for

auditing of, and reporting on, the use of any funds provided by the Secretary under the cooperative agreement;

(ii) the criteria to be used to ensure that early pest detection and surveillance activities supported under the cooperative agreement are based on sound scientific data or thorough risk assessments; and

(iii) the means of identifying pathways of pest introductions.

(5) Use of funds

(A) Plant pest detection and surveillance activities

A State department of agriculture that receives funds under this subsection shall use the funds to carry out early plant pest detection and surveillance activities approved by the Secretary to prevent the introduction or spread of a plant pest.

Appendix C

(B) Subagreements

Nothing in this subsection prevents a State department of agriculture from using funds received under paragraph (4) to enter into subagreements with political subdivisions of the State that have legal responsibilities relating to agricultural plant pest and disease surveillance.

(C) Non-Federal share

The non-Federal share of the cost of carrying out a cooperative agreement under this section may be provided in-kind, including through provision of such indirect costs of the cooperative agreement as the Secretary considers to be appropriate.

(D) Ability to provide funds

The Secretary shall not take the ability to provide non-Federal costs to carry out a cooperative agreement entered into under subparagraph (A) into consideration when deciding

whether to enter into a cooperative agreement with a State department of agriculture.

(6) Special funding considerations

The Secretary shall provide funds to a State department of agriculture if the Secretary determines that–

(A) the State department of agriculture is in a State that has a high risk of being affected by 1 or more plant pests or diseases, taking into consideration–

(i) the number of international ports of entry in the State;

(ii) the volume of international passenger and cargo entry into the State;

(iii) the geographic location of the State and if the location or types of agricultural commodities produced in the State are conducive to agricultural pest and disease establishment due to the climate, crop

diversity, or natural resources (including unique plant species) of the State; and

(iv) whether the Secretary has determined that an agricultural pest or disease in the State is a Federal concern; and

(B) the early plant pest detection and surveillance activities supported with the funds will likely–

(i) prevent the introduction and establishment of plant pests; and

(ii) provide a comprehensive approach to compliment Federal detection efforts.

(7) Reporting requirement

Not later than 90 days after the date of completion of an early plant pest detection and surveillance activity conducted by a State department of agriculture using funds provided under this section, the State

department of agriculture shall submit to the Secretary a report that describes the purposes and results of the activities.

(c) Threat identification and mitigation program

(1) Establishment

The Secretary shall establish a threat identification and mitigation program to determine and address threats to the domestic production of crops.

(2) Requirements

In conducting the program established under paragraph (1), the Secretary shall–

(A) develop risk assessments of the potential threat to the agricultural industry of the United States from foreign sources;

(B) collaborate with the National Plant Board; and

(C) implement action plans for high consequence plant pest and diseases to assist in preventing the introduction and widespread dissemination of new plant pest and disease threats in the United States.

(3) Reports

Not later than 1 year after the date of enactment of this paragraph, and annually thereafter, the Secretary shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report on the action plans described in paragraph (2), including an accounting of funds expended on the action plans.

(d) Specialty crop certification and risk management systems

The Secretary shall provide funds and technical assistance to specialty crop growers, organizations representing specialty crop growers, and State and local agencies working with specialty crop growers and organizations for the development and implementation of–

(1) audit-based certification systems, such as best management practices–

(A) to address plant pests; and

(B) to mitigate the risk of plant pests in the movement of plants and plant products; and

(2) nursery plant pest risk management systems, in collaboration with the nursery industry, research institutions, and other appropriate entities–

(A) to enable growers to identify and prioritize nursery plant pests and diseases of regulatory significance;

(B) to prevent the introduction, establishment, and spread of those plant pests and diseases; and

(C) to reduce the risk of and mitigate those plant pests and diseases.

(e) Funding

Of the funds of the Commodity Credit Corporation, the Secretary shall make available to carry out this section–

(1) $12,000,000 for fiscal year 2009;

(2) $45,000,000 for fiscal year 2010;

(3) $50,000,000 for fiscal year 2011; and

(4) $50,000,000 for fiscal year 2012 and each fiscal year thereafter.

7 U.S.C. § 7731. Inspections, seizures, and warrants

(a) Role of Attorney General

The activities authorized by this section shall be carried out consistent with guidelines approved by the Attorney General.

(b) Warrantless inspections

The Secretary may stop and inspect, without a warrant, any person or means of conveyance moving–

(1) into the United States to determine whether the person or means of conveyance is carrying any plant, plant product, biological control organism, plant pest, noxious weed, or article subject to this chapter;

(2) in interstate commerce, upon probable cause to believe that the person or means of conveyance is carrying any plant, plant product, biological control organism, plant pest, noxious weed, or article subject to this chapter; and

(3) in intrastate commerce from or within any State, portion of a State, or premises quarantined as part of a extraordinary emergency declared under section 7715 of this title upon probable cause to believe that the person or means of conveyance is carrying any plant, plant product, biological control organism, plant pest, noxious weed, or article regulated under that section or is moving subject to that section.

(c) Inspections with a warrant

(1) General authority

The Secretary may enter, with a warrant, any premises in the United States for the purpose of conducting investigations or making inspections and seizures under this chapter.

Appendix C

(2) Application and issuance of a warrant

Upon proper oath or affirmation showing probable cause to believe that there is on certain premises any plant, plant product, biological control organism, plant pest, noxious weed, article, facility, or means of conveyance regulated under this chapter, a United States judge, a judge of a court of record in the United States, or a United States magistrate judge may, within the judge's or magistrate's[1] jurisdiction, issue a warrant for the entry upon the premises to conduct any investigation or make any inspection or seizure under this chapter. The warrant may be applied for and executed by the Secretary or any United States Marshal.

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[1] So in original. Probably should be "magistrate judges's".

No. 10-979

In The
Supreme Court of the United States

FLORIDA DEPARTMENT OF AGRICULTURE
& CONSUMER SERVICES,
AND FLORIDA COMMISSIONER OF AGRICULTURE
CHARLES BRONSON,

Petitioners,

v.

TOBY BOGORFF, ROBERT BOGORFF, TIMOTHY FARLEY, BETH GARCIA, ROALD GARCIA, ROBERT PEARCE, AND BARBARA PEARCE, AS REPRESENTATIVES OF THE CERTIFIED CLASS

Respondents.

On Petition for Writ of Certiorari
to the Fourth District Court of
Appeal of Florida

BRIEF FOR THE RESPONDENTS' IN OPPOSITION

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QUESTION PRESENTED

Whether Florida law requiring just compensation for the taking of healthy citrus trees presents an independent adequate state ground precluding federal review and whether that Florida law requiring just compensation conflicts with *Miller v. Schoene*, 276 U.S. 272 (1928).

TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 3

A. The Independent Adequate State Ground 3

B. There is No Conflict with *Miller v. Schoene* 6

C. There is No Important Unanswered Question of Federal Law 7

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Dep't of Agriculture & Consumer Services v. Bogorff, 35 So. 3d 84 (Fla. 4th DCA 2010) 3

Fox Film Corp. v. Miller, 296 U.S. 207 (1935) 5

Haire v. Dep't of Agriculture and Consumer Services, 870 So. 2d 774 (Fla. 2004) 4

Mid-Florida Growers I, v. Dep't of Agriculture and Consumer Services, 521 So. 2d 101 (Fla. 1988) 4

Miller v. Schoene, 276 U.S. 272 (1928) ..... *passim*

Miller v. State Entomologist, 146 Va. 175 (Va. 1926) 1

Patchen v. Dep't of Agriculture and Consumer Services, 906 So. 2d 1005 (Fla. 2005) 4

Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926) 5

State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959) 3-4

Wainwright v. Sykes, 433 U.S. 72 (1977) 5

Wilson v. Loew's Inc., 355 U.S. 597 (1958) 5

Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562 (1977) 5

STATUTES/CONSTITUTION

§581.1845, Florida Statutes 1

Article X, section 6(a) of the Florida Constitution 4

STATEMENT OF JURISDICTION

Petitioner mistakenly asserts that the decision below conflicts with *Miller v. State Entomologist*, 146 Va. 175 (Va. 1926). Pet. 1. It meant to write *Miller v. Schoene*, 276 U.S. 272 (1928), this Court's review of the Virginia decision. As we demonstrate below, there is no conflict, nor is there any important but unanswered federal question presented by the decision below. Most importantly, the decision below rests on an independent, adequate state law ground – the Florida Constitution – thus precluding any review by this Court.

STATEMENT OF THE CASE

Between 2000 and 2006, the Florida Department of Agriculture and Consumer Services destroyed over 100,000 healthy, residential citrus trees in Broward County, Florida which were not infected with citrus canker. These residential trees were sacrificed under the Citrus Canker Eradication Program ("CCEP") to protect Florida's commercial citrus industry. Florida law entitles homeowners to seek full compensation for the destruction of their healthy, uninfected, residential citrus trees under the CCEP. Broward County Homeowners sued the Florida Department of Agriculture and Consumer Services and its Commissioner, Charles Bronson (collectively, the "Department") to recover full compensation for the taking of their private property for a public purpose. The trial court granted summary judgment of liability on the homeowners' claim under §581.1845, Fla. Stat., and following a non-jury trial, found the Department liable in inverse condemnation. A jury later awarded the Broward County Homeowners $11,531,463.00 in aggregate compensation for their trees (before setoffs). In October 2008, the Broward circuit court awarded prejudgment interest, and entered final judgment in favor of the Broward

County Homeowners for $8,043,541.50.

Homeowners' tree appraisal expert Eric Hoyer, a certified consulting arborist, opined that the Broward County Homeowners' uninfected citrus trees had compensable value. The Department also recognized the compensable value of the Broward County Homeowners' trees. Deputy Commissioner Craig Meyer told the citrus canker task force that $200 would be "way low" for the value of residential citrus trees to be destroyed. Connie Riherd, Assistant Director of the Department's Division of Plant Industry ("DPI"), concluded that $361 was the value of the majority of healthy trees to be destroyed, and $791 would be the value for the largest trees.

Broward County Homeowners' tree appraisal expert also testified that replacement cost is the proper method for calculating damages in this takings case: "Trees are appraised generally for their cost of replacement and *not* in diminution of real estate . . . ." (emphasis added). Another registered tree appraiser agreed. When appraising residential citrus trees, tree appraiser John Harris appraises the value of the tree itself, *not* the value of the residential property as a whole. DPI Assistant Director Riherd, who performed the research regarding the value of healthy citrus trees to be destroyed, concluded that "replacement cost" was the most appropriate formula to determine the value of residential citrus trees, choosing that method over several others, including one measuring the decrease in the homeowners' real property.

Department witnesses conceded that canker never threatened the food supply and did not present a threat to humans or animals. The Department also never warned or advised the public to avoid eating fruit from canker-infected trees, and no one outside the Department ever characterized

citrus canker as a "public nuisance." The trial court found the Department's actions constituted a taking of compensable property, and that its public nuisance, lack of compensable value and intervening cause defenses did not defeat the Broward County Homeowners' right to recover full compensation. The trial court also concluded that replacement cost was the proper method for determining damages in this takings case for the destruction of a few residential trees on each property. After judgment was entered on the jury verdict, the Department appealed and the Florida Fourth District Court of Appeal affirmed the verdict and the damages awarded. *Bogorff*, Pet. App. 1a-16a.

ARGUMENT

The Petitioner contends that the decision below conflicts with *Miller v. Schoene*, 276 U.S. 272 (1928). Pet. 16. There is no conflict with *Miller*, and because the decision below rests on an independent adequate state ground, there is no jurisdiction in this Court.

A. The Independent Adequate State Ground

The decision below rejected the Petitioner's argument that the Florida legislature did away with "inverse condemnation of citrus trees and replaced it with an exclusive statutory claim." *Dep't of Agriculture & Consumer Services v. Bogorff*, Pet. App. 3a (footnote omitted). The court's response was that "more than a half century ago in *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959), a case involving a predecessor agency of [Petitioner] DACS also destroying healthy trees, the [Florida Supreme] court made very clear that 'where, as here a [constitutional] provision for just compensation is a clear requisite to the act of destructions,"' the legislature cannot limit compensation. *Bogorff*, Pet. App. 10a (first two

brackets added). The court below continued:

> Then again, little more than 20 years ago, in *Mid-Florida Growers I*, [adv. *Dep't of Agriculture and Consumer Services*, 521 So. 2d 101 (Fla. 1988)] another case also involving a state agency's destruction of healthy citrus plants to eradicate a plant disease, the supreme court reaffirmed *State Plant Board* in holding that constitutional just compensation "was a clear requisite . . . to the act of destroying healthy trees." 521 So. 2d at 104. Even more emphatically, the court added: "Because article X, §6 Fla. Const. is self-executing, it is immaterial that there is no statute specifically authorizing recovery for loss.' 521 So. 2d at 104 n.2.

Bogorff, Pet. App. 11a.

Article X, section 6(a) of the Florida Constitution provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." The Florida Supreme Court has consistently adhered to the Florida constitutional mandate in a long string of canker cases, from *State Plant Board*, and *Mid Florida Growers* through *Haire v. Florida Dep't of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004) and *Patchen v. Florida Dep't of Agriculture and Consumer Services*, 906 So. 2d 1005 (Fla. 2005).

In *Patchen*, the Florida Supreme court quoted *Haire* quoting *State Plant Board's* quotation from an even earlier case: "Thus the Citrus Canker Law sets a compensation floor that is consistent with the established principle that the 'determination of what is just compensation . . . is a judicial function that cannot be performed by the legislature.' [State

Plant Board] quoting *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451, 454 (1926))". *Patchen*, 906 So. 2d at 1008. *State Plant Board* undeniably rested on Article X, section 6 of the Florida Constitution. 521 So. 2d at 104, n.2. *Spafford* rested on the pre-1968 Florida constitution's due process and takings/just compensation clause. *Spafford*, 110 So. at 619.

The decision below followed these Florida constitutional precedents: "If the compensation required by the Constitution exceeds a statutory amount, the State will have to pay that amount. *Bogorff*, Pet. App. 12a.

Because the decision below rested on Florida law, this Court is without jurisdiction. Even if one sought to find a Fifth Amendment takings component to the decision below, jurisdiction would still be lacking. "[T]he case is controlled by the settled rule that where the judgment of a State court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Miller*, 296 U.S. 207, 210 (1935).

Here, the nonfederal ground is the only ground upon which the decision below rests, and the "well established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts" applies. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). *See also Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958).

Certiorari should be denied.

B. There is No Conflict with *Miller v. Schoene*

In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court upheld the Cedar Rust Act of Virginia against a claim that the statute violated the due process clause of the Fourteenth Amendment. The Court held that "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.* at 278. It also rejected the argument that the Cedar Rust statute was vague: "The objection of plaintiffs in error to the vagueness of the statute is without weight." *Id.* at 281.

Thus *Miller* has no bearing upon the Florida court's holding that the Florida Constitution's just compensation clause requires payment for the taking of healthy citrus trees. Florida did not exceed its powers in interpreting its Constitution to mandate compensation. *Miller* simply held that a "state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.* at 279. The Court found the state's social policy decision did not constitute "any denial of due process." *Id.* at 280.

Because *Miller* does not address a state's decision to provide just compensation for taking healthy trees as part of its social (and constitutional) policy, *Miller* does not pose any conflict with the decision below.

C. There is No Important Unanswered Question of Federal Law

Nor does the ultimate question in this case – whether Florida's decision to provide just compensation under its Constitution – present any important but unanswered federal question. The Petitioner's submission that *Bogorff* must be reversed because "[w]hen a state is unable to act effectively to combat a plant pest, agriculture suffers, the food supply is threatened, and the federal government may have to step in" (Pet. 22) is pure hyperbole.

Neither the decision below, nor the litany of Florida decisions leading to it, support the Petitioner's submission. The law is clear in Florida that the State *is* able to act effectively to combat a plant pest. The law is also clear that when the State does so act and takes healthy, useful private property in order to carry out its mission, it must compensate the property owners.

Florida's food supply is alive and well, and federal forces need not be poised for entry because Florida follows its Constitution.

CONCLUSION

This Court should not "step in" to review this case. Established federal law precludes review of the decision below. Certiorari should be denied.

Respectfully submitted,

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